



EMPLOYMENT TRIBUNALS

Claimant: Miss Kathryn Abbott

Respondents: Siemens Industrial Turbo Machinery Limited
Mr A Mills
Ms C Coates
Mr P Walker
Mr N Johnson

Heard at: Nottingham

Heard on: 19 April 2023

Before: Employment Judge Victoria Butler (sitting alone)

Representation

Claimant: Did not attend

Respondent: Miss T Vittorio, Senior Legal Adviser

JUDGMENT

1. The Claimant's claims against all Respondents are struck out under Rule 37(1)(c) of the Employment Tribunal Rules 2013.

REASONS

Background

1. I have provided written reasons for my judgment because the Claimant did not attend the hearing.
2. This claim has a long procedural history which is important background for the purposes of this judgment.
3. The Claimant issued her first claim on 13 August 2020 citing complaints of direct discrimination because of disability and/or sex: discrimination arising from disability:

indirect disability and/or sex discrimination: failure to make reasonable adjustments: equal pay; and unauthorised deductions from wages.

4. She issued a second claim on 22 December 2021 citing complaints of unfair dismissal and discrimination.
5. The parties have attended preliminary hearings on 4 November 2020, 8 November 2021, 2 March 2022, 16 January 2022 and 31 January 2023.
6. The preliminary hearing on 16 January 2022 was unable to proceed because the Claimant had failed to comply with earlier Orders, including provision of an impact statement. She had also failed to collate all her medical records into one bundle and complete a Scott Schedule. In consequence, an Unless Order was issued in the following terms:

1. No later than 28 days from the date this order is sent out to the parties (for the avoidance of doubt that is 28 days from the date which appears at the foot of this document) the claimant must set out in a document (by either completing the Excel Scott Schedule/ spreadsheet provided by the respondent or in a Word formatted document) the following information and send the document to the respondent and the tribunal. In connection with each and every one of her complaints of disability discrimination whether brought under sections; 15, 20/21 and 26 or otherwise of the Equality Act 2010 and in respect of both set of proceedings before the tribunal, the claimant is to set out the following;

1.1. A list of all the acts or omissions which she is complaining about. The acts/omissions are to be set out in date order, each allegation numbered and include the following additional information in respect of each;

1.1.1 The **date** or approximate date when each alleged act or omission took place.

1.1.2 The **name** of the individual/s who the claimant alleged did the alleged act or was responsible for the alleged omission and if the claimant does not know who it is, then she must say so.

1.1.3 Set out briefly **why** she alleges each alleged act /omission was disability discrimination and in respect of each act/omission which disability she says this relates to (or if more than one, which ones)

1.1.4 With respect to the claims of a failure to make reasonable adjustments; the claimant must provide the below information;

1.1.4.1. what disadvantage she suffered at work i.e. what was it that she found it difficult to do **and** because of which disability/s? (e.g., I found it difficult to climb stairs because of my ankle injury)

1.1.4.2 what the claimant alleges the respondent could and should have done to remove or reduce that disadvantage/difficulty (e.g. relocate my office to remove the difficulty of climbing stairs because of my ankle injury)

2. **No later than 35 days from the date this order is sent out to the parties** the claimant must send in writing to the respondent and the tribunal a **finalised Impact Statement** which must be the version that she will rely upon at the preliminary hearing to determine the issue of disability.

The preliminary hearing on 31 January 2023

7. The hearing was listed to determine whether the Claimant had complied with the terms of the Unless Order and was conducted by Employment Judge Heap (EJ Heap).
8. EJ Heap determined that the Claimant had not materially complied with the Unless Order in respect of all complaints of harassment and all complaints of discrimination arising from disability, save for the matter of her dismissal. All of those complaints were therefore dismissed with effect from midnight on 19 July 2022.
9. EJ Heap also determined that the Claimant had materially complied with the Unless Order to produce an impact statement and further information about the discrimination arising from disability and failure to make reasonable adjustments claims. However, given that there were a number of outstanding matters in the pleadings and the case more generally she converted the 12-day final hearing (commencing today) to this preliminary hearing to determine the following:

“2.2 The Preliminary hearing will deal with the following matters unless the Employment Judge hearing it decides otherwise:

2.2.1 If it is in dispute whether the Claimant needs permission to amend the claim in respect of any complaints of a failure to make reasonable adjustments and, if she does, whether to grant permission to amend the claim;

2.2.2 If the Claimant makes an application for relief from sanction whether that should be granted including consideration as to whether any defects in the original response to the Unless Orders made by Employment Judge Broughton have been rectified;

2.2.3 Whether to strike out the complaint about equal pay under Regulation 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 because it appears that the complaint has been presented outside of the statutory time limit contained in Section 129 Equality Act 2010;

2.2.4 Whether the Claimant was a disabled person at the material time on account of the conditions of hidradenitis suppurativa, acute anxiety and low mood and protracted problems following the fracture of her ankle;

2.2.5 Whether to grant the Claimant’s extant application to strike out the Responses of the Respondents;

2.2.6 If the Respondent makes any application to strike out all or any part of the sex discrimination or monetary claims or applies for a Deposit Order to determine those applications;

2.2.7 To define the issues in the claim; and

2.2.8 To make any further necessary Orders for the conduct of the claim including listing it for a full merits hearing if appropriate.

2.3 The following Orders apply to the Preliminary hearing:

2.3.1 The Respondents must send to the Claimant a draft bundle for use at the Preliminary hearing by no later than 21st March 2023;

2.3.2 By no later than 28th March 2023 the Claimant must send to the Respondent any other documents that she wishes to be included within that bundle relevant to the issues to be determined at the Preliminary hearing;

2.3.3 By no later than 5th April 2023 the Respondents must send to the Claimant and to the Tribunal any application that they may wish to make regarding a strike out of any remaining part of the claim or any application for a Deposit Order; and

2.3.4 By no later than 12th April 2023 the Claimant must send a witness statement to the Tribunal and to the Respondents setting out why she says that the equal pay complaint was presented in time and particularly the full basis upon which she says that she was still employed as Group Leader in July 2021.”

10. EJ Heap also made the following orders in advance of today as follows:

“1. Further Information from the Claimant

1.1 By no later than 28th February 2023 the Claimant must provide the following information to the Respondent and to the Tribunal:

1.1.1 If the Claimant is applying for relief from sanction the basis of that application;

1.1.2 If the Claimant is continuing a claim against the individual Respondents and, if so, she must identify in accordance with the Order made immediately below what complaint(s) she advances against each of them;

1.1.3 In respect of the claims that remains to set out in the attached tables all complaints of direct sex discrimination and indirect sex discrimination with reference to the case expressly pleaded in the first Claim Form;

1.1.4 To set out full details of any claim for holiday pay, unpaid wages and other payments including what sum is claimed, how it has been calculated and when it fell due to be paid; and

1.1.5 In respect of each claim of a failure to make reasonable adjustments set out at box 22 of the excel spreadsheet comprising the further information previously provided, to identify where that complaint is in either of the Claim Forms issued and if it is not in either Claim Form whether she is making an application to amend the claim.”

The hearing today

11. The Claimant failed to attend the hearing today. She did not make an application to postpone it, nor did she notify the Respondent or the Tribunal that she would not be in attendance. The Tribunal clerk telephoned her (but was unable to leave a message) and sent an email to which there was no response.

12. The Claimant had not attended by 10.45am and I proceeded in her absence given that she was aware the hearing was taking place and had made no application to postpone it.

The correspondence from Dr Brady

13. On 14 April 2023, the Tribunal received a letter dated 13 April 2023 from Dr Carol Brady, the Claimant's Psychologist. Within the letter Dr Brady said that she met with the Claimant on 6 April and also on 12 April 2023 and that she was in a state of considerable distress. She said:

"Miss Abbott attended a Preliminary Hearing over the internet on 31 January, during which you specifically instructed her not to take notes and instructed that you would then send out Orders after the hearing, to which Miss Abbott would have 28 days to respond. As of yesterday (12 April) she had still not received the CMO despite contacting the Court Office several times. I have seen copies of emails she has sent to the Court. However, on 6 April she received a note that you had reviewed the case on 29 March and Miss Abbott was asked to confirm if she had complied with the Orders made at the last preliminary hearing. She had already made a submission on 4 April, of her Impact Statement, medical records and a timeline. However, she remains unclear as to what else she is required to submit, and is very anxious that she has missed the deadline on this. She was clearly experiencing a significant increase in anxiety, which then makes dealing with the case even more difficult. Can a copy of the CMO be sent to Miss Abbott's home address so that she can ensure that she has complied?"

This situation is compounded by her difficulty in dealing with correspondence, to which I referred in my previous letter. In 2022 the Court ordered the Respondent to cease communicating with Miss Abbott directly and to send correspondence in hard copy to her Union Office. Despite the Court Order, the Respondent has emailed the Union Representative who then contacted Miss Abbott in an attempt to engage her in an internal grievance appeal. When the Respondent breached the Court Order by emailing her directly on her Hotmail account, she stopped looking at her correspondence again. This is what I would expect to happen, and it may mean that she has missed correspondence from the Court. Breaches in the Respondents Communication Order means she must build back up again to checking her emails. She has now asked the Siemens Union Representative to stop contacting her.

However, Miss Abbott accepts that she must now look at all correspondence and is willing to use her new home address for this to avoid any future confusions. I have explained her difficulties in dealing with correspondence and with the case previously. The pain from flare ups of her HS makes concentration difficult, and her anxiety adds to this. She reports that she has been in flare up for over 6 months, resulting in considerable pain and exhaustion, which has had a significant emotional impact. Recently she an eye gland infection possibly linked to HS requiring ongoing hospital treatment. When the Respondent persists in making frequent contact it triggers her phobic anxiety. Miss Abbott believes that this is a deliberate strategy on their part..."

14. Attached to the letter was an email from the Claimant in which she said:

"With all the below I am not able to focus solely on preparing ET claims and this continues to be a source of anxiety; firefighting, panic reacting to the next ET and/or Appeal "event". I have not complied with CMO following PH on 31-01-2023. I take full responsibility. These are reasons why:

1. *Still waiting for CMO from PH held on 31-01-2023.....*
 2. *I also admit I have never been able to read in full any ET CMO since starting ET claims in 2020 due to numerous health problems and difficulties opening email attachments. I accept avoidance of correspondence continues to cause problems (and is a further source of uncertainty/stress/worry) not just ET and/or Appeal but home life....*
 3. *No legal knowledge/understanding and complexities involved with ET rules, practices...*
 4. *Overarching sense of unfair/unjust...*
 5. *ET claims not standard...*
 6. *Running in parallel ET claims and Appeal...*
 7. *Appeal outstanding 18 months and that is a lot to deal with especially when continued urgency regarding “never ending” meetings; not strong enough with low self-esteem/confidence I just panic. I will not engage again....*
 8. *I felt penalised Siemens/ET – harbouring long-term self-doubt with ET Unless Orders unfair/counterproductive and leads to procrastination.*
 9. *Claims and/or Appeal “Topic” continues to trigger mental, physical, emotional symptoms. I asked ET to accept vulnerable and easily derailed yet trying my absolute very best under “exceptional circumstances” to comply with ET orders...*
 10. *Health HS relapse since September 2022; two weeks out of each months physically miserable.*
 11. *I will issue further details regarding unfair dismissal and key evidence, in the next few days”*
15. Also, within the letter was attached various documents, namely “evidence” that the Claimant had been attempting to chase EJ Heap’s Judgment and Case Management Orders. However, the evidence pre-dates the sending of the Orders and there is nothing post-dating it.

The Respondent’s application to strike out the claim

16. The Respondent made an application to strike out the claim under Rule 37(1)(c) of the Rules.
17. Ms Vittorio submitted that there was a complete non-compliance by the Claimant with the Tribunal’s Orders, as acknowledged by her in her e-mail dated 13 April 2023. Whilst she had arguably attempted to comply with the Order in respect of applying for relief from sanction, she had failed to set out the basis of the application, failed to comply with the Unless Order and failed to address the interests of justice test.
18. Ms Vittorio submitted that the Claimant will simply not engage with the proceedings and has said as much in Dr Brady’s letter. Furthermore, she has now asked her Union rep to stop contacting her and admits that most of the Respondent’s letters so far have gone unread, as have the Tribunal’s Case Management Orders.

19. Given the Claimant's failure to comply with Orders, the Respondents still do not know the case against them despite the first claim being issued two-and-a-half-years ago. Given that non-engagement, a fair hearing is simply not possible.
20. The Claimant has not provided a valid explanation why she has failed to comply with the Tribunal's Orders, she has simply ignored them. In respect of the reasons attached to Dr Brady's letter, Ms Vittorio submitted that it was always open to the Claimant to seek assistance from her Union or other free legal representation, but she has chosen not to.
21. The Claimant has not provided any evidence that she will be fit for a hearing in the future and, as such, a fair hearing will not be possible.
22. Ms Vittorio also highlighted the immeasurable stress these proceedings have placed on the named individual Respondents and the toll it is taking on their mental health more generally.

The law

23. In considering the Respondents application to strike out the Claimant's claims under Rule 37(1)(c), I have had regard to the guidance set out in ***Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR371 EAT*** as follows:

"But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

24. I must also be satisfied that striking out the claim or any part of the claim is a proportionate measure.

Conclusions

The Claimant's submission that she did not receive the Orders

25. At the outset, I addressed the Claimant's submission that she had not received EJ Heap's case management Orders. She has provided a screen shot of a telephone call and e-mail to the Tribunal chasing the Orders, both of which pre-date 7 March 2023 when they were sent to the parties. If the Claimant had been chasing the Tribunal after this date yet not received a response, I would expect to see evidence reflecting this.
26. I also observe that the Claimant has continued to engage with the Tribunal after 7 March 2023 by sending in her impact statement and various other documents.

27. The Claimant was at the hearing before EJ Heap and Ms Vittorio assures me that she did not hear EJ Heap tell the Claimant not to make any notes. In any event, the Claimant was fully aware that Orders had been made and that there were deadlines. It was incumbent on her to make sure she had the documents that she needed. She offers no good reason why she did not alert the Tribunal at an earlier date that she had not allegedly received EJ Heap's Orders.
28. Regardless, it is highly unlikely that the Claimant would have complied with them in any event given her admission that most of the Tribunal's previous Orders remain unread.
29. I am satisfied that, on the balance of probabilities, the Claimant received the Orders but has simply chosen not to comply with them. I acknowledge there was a delay in the Orders being sent to the parties, but even after receipt on 7 March 2023, the Claimant has still failed to comply with them, or at least attempt to comply albeit late.

The magnitude of the Claimant's non-compliance

30. I have considered the magnitude of the Claimant's non-compliance with the Orders. I am satisfied that there has been wholesale non-compliance. Whilst she attempted to comply with the Order to set out the basis of an application for relief against sanction, (i) it was out of time and contained no application to extend time (ii) she failed to set out any grounds for an application, and (iii) she still failed to provide the information as required under the Unless Order in the first place.
31. The Claimant has also still not done the following: (i) identified which complaints are advanced against each individual Respondent (ii) completed the tables in respect of the direct sex discrimination and indirect discrimination claims with reference to the case expressly pleaded in the first claim form (iii) set out the details for her claim for holiday pay, unpaid wages and other payments including what sum is claimed, how it has been calculated and when it fell due to be paid or (iv) provided a witness statement setting out why she says that the equal pay complaint was presented in time and the full basis on what she says is employed as Group Leader in July 2021.
32. Accordingly, I am satisfied that there has been complete non-compliance with EJ Heap's Orders. The default was entirely the responsibility of the Claimant as she acknowledges in the e-mail attachment to Dr Brady's letter.

The unfairness and prejudice caused to the Respondents

33. In terms of the unfairness and prejudice caused to the Respondents, I am satisfied that it is substantial.
34. The Respondents still do not know the claims they are required to meet despite the first claim being issued over two-and-a-half years ago with no indication of when they will, if at all. This is inherently unfair on the Respondents, but more so on the named Respondents who carry the strain of the proceedings with them daily.
35. It is inevitable in any case involving significant delay that memories fade and the prejudice to the Respondents' evidence is substantial, particularly given they do not

know the case they are required to answer yet. One witness has already left the first Respondent and, as time progresses, the likelihood of other witnesses leaving increases.

36. There is also significant prejudice to the Respondents in respect of the time and cost incurred in dealing with these proceedings to date and in the future.

Is a fair hearing still possible?

37. I do not believe that the claim will ever get to a stage where a fair hearing is possible. This is the sixth preliminary hearing, and the claim is barely out of the starting blocks. The Claimant has arguably had a disproportionate amount of assistance from the Tribunal in helping her formulate her claims, yet she has continually failed to provide the requisite information and/or comply with its Orders.
38. If she cannot articulate her claim or engage with the Tribunal proceedings some two-and-a-half years after their issue, it strikes me as unlikely that she will ever reach a point where she can.
39. I note in previous correspondence Dr Brady has said that she would provide an update on the Claimant's fitness to engage in the proceedings, but there is no reference to this in her most recent letter. Rather, she describes that the Claimant remains in a state of distress.
40. The Claimant has had access to Union assistance during the internal proceedings, and clearly has access to Union advice. Furthermore, it was always open to her to obtain additional assistance, but she has elected not to.
41. As above, the prejudice to the Respondents' evidence is substantial particularly given they do not know the case they are required to answer yet.
42. I am also mindful of the impact of the Claimant's conduct on other Tribunal users as previously highlighted to her. This case has already used a disproportionate amount of Tribunal resource and is no further forward.
43. Article 6 of the European Convention on Human Rights sets out the right to a fair trial within a reasonable time. This claim is at an embryonic stage two-and-a-half years after issue and the basis of it remains unclear. The Claimant has failed to engage properly to date, and I am satisfied that it is unlikely that she will ever be able to do so. Accordingly, I am satisfied that a fair trial in a reasonable time is not possible.

Lesser sanction?

44. I have had regard to the steps taken so far by the Tribunal to assist the Claimant to no avail. As such, I do not consider that there is any appropriate lesser sanction. She has been provided with appropriate guidance and numerous bites of the cherry to provide details of her claim but even an Unless Order has not prompted her to engage and comply. Further orders of any nature would still not, in my view, elicit the required information from her.

45. As such, I am satisfied that a lesser sanction will not address the Claimant's continual failure to engage with the case and is, therefore, not appropriate.
46. I have also had regard to the fact that, in the main, the Claimant has failed to comply with orders relating to the discrimination/equal pay/wages claim and not the unfair dismissal claim.
47. I considered whether it would be appropriate to allow the unfair dismissal part of the claim to proceed but concluded not. This is for the same reasons, namely the Claimant's lack of engagement to date. I do not envisage that the unfair dismissal claim will be any different.
48. Accordingly, I am satisfied that it is appropriate to strike out the Claimant's claim under Rule 37(1)(c).

The Claimant's application to strike out

49. For completeness, Ms Vittorio addressed me on the Claimant's application to strike out the Respondents' response.
50. Firstly, I take the view that the claim has already been struck so the Claimant has no standing to make the application. However, I set out my considerations for completeness.
51. The Claimant's application is predicated on a breach of a previous Order that the Respondents only communicate with her by post. Ms Vittorio admits that she copied the Claimant into an email to the Tribunal in error and at a time when she had only recently taken over the case. She submitted that there was no prejudice to the Claimant because she received the communication a few days later via post in any event, it was not addressed to her, the Claimant would have been expecting the contents of the email and, finally, she could have chosen not to open it anyway.
52. I do not consider that there has been any major non-compliance with the Order. It was simply an error and no more than that. There was no further breach of the Order, and a strike out would be entirely disproportionate to the breach, as would any sanction at all for this minor mistake.

Employment Judge Victoria Butler

Date: 18 May 2023

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